THE RIGHT OF THE TERRITORIES TO BECOME STATES OF THE UNION

"Submitted in Partial Fulfillment of the Requirements for the Degree of Doctor of Philosophy in the University Faculty of Political Science, Columbia College."

BY

EDMUND STEELE JOY, A.M., LL.B.

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INTRODUCTION.

The conflict of opinion regarding the nature of the American Union was settled by the Civil war. Many held before that time, that the Nation was the result of a compact entered into by free and independent States, which, while recognizing the Constitution as a common bond of union, yet left to each State as a part of an inherent sovereignty, the right either to nullify a national obligation or to withdraw without the circle of national influence and power.

This conception of the Union, which is known as the states-rights doctrine, was adopted by the Southern States, and their deliberate acts of secession were the immediate cause of the Civil war and all its attending disasters.

But with the defeat of the South, the dogma of states-rights perished. Henceforth the Constitution is to be viewed, not as a compact between sovereign States, but as the fundamental law of the whole land—as the expression of the will of the entire Nation—and arguments relating to it must be based upon that fundamental conception.

Among the first fruits of the triumph of the North was the adoption of three amendments to the Constitution, which gave a number of important powers to the central government, which were hitherto deemed to rest exclusively within

the province of the States. A series of acts was passed by Congress, which was in direct violation of principles hitherto maintained, and manifested a disposition to exalt the national idea by eliminating from State life theories of action from which the dogma of state-rights could again spring into being. I refer to those acts relating to the reconstruction of the rebellious States and their restoration to their former practical relations with the rest of the Union, and to some acts admitting new States.

The practical course pursued in the restoration of the old States throws new light upon the process of State formation and admission, which is reflected in the debates in Congress, incident to the admission of new States. It had often been maintained that the territories of the United States had the right to be admitted into the Union as States. This claim now met with rigid criticism, and even bold denial.

It will be our purpose to discover whether such a principle is recognized under our Constitution, as that which ascribes to the people of the territories the right to become members of the Union.

The subject finds an apt and handy illustration in the present interest which surrounds the case of Utah. Her population is numerous enough; her wealth and resources great enough to equal and surpass the estimates in corresponding particulars of many another territory, at the time of admission.

A large part of Utah's population believes in the Mormon religion, and there is objection to admitting her on that account. Can the inhabitants of the territory of Utah insist upon her admission as State, or can she be forever held in her present position as a territory of the United States by the

refusal of Congress to admit her? To answer this question, it will be necessary to know what power each of the parties to the transaction has in the matter.

I.—Opposing Conceptions of the Character of States and the Nature of the Process of Admission.

The statements made at the period first alluded to, as well as the arguments that have generally been advanced, in favor of, or against, the admission of States as they have successively applied for entrance into the Union, disclose very fully the claims that can be made in favor of the territory on the one hand, and of Congress on the other.

These arguments reveal antagonistic conceptions of the character of States, and of the nature of the process of admission. By those who favor the territorial claim to admission, the State is viewed as a political community, having all the rights guaranteed by the Constitution to members of the Union, and possessing, besides, inherently, all the residuary powers of self-government not expressly granted by the Constitution to the Federal Government.[1] The important distinction is made by them between the formation of such a State and its admission. It is granted that Congress has power to admit States; but the power to create them resides only in the people of the territory. It is by their sovereign will, alone, that the State comes into existence. The admitting acts, on the part of Congress, are viewed as simply supplementary to the course pursued by the territories, and in the nature of expressions of national

[1] As to what constitutes a State, see Texas vs. White. 7 Wallace, 700.

approval of territorial action, or an acceptance of a situation which the territories themselves have legally brought about.

On the other hand, the State is viewed by those who ascribe to Congress unlimited control over the matter, as a political corporation, created by the Congress of the United States for the purpose of local government, with such rights belonging to it as are guaranteed by the Constitution to members of the Union, but with only such other rights as may be left undisturbed by Congress. Under this theory, no right to become a State is recognized as inherent in a community.[1] Authority to form a State Constitution and government is given by Congress to a particular territory, through an enabling act. If the constitution adopted is in conformity with the requirments of that act, a law to admit the territory into the Union as a State is passed. These acts are not mere sequences to the assertion by the territories of valid claims to admission, but powerful acts of creative force.

The operation of the principle of popular sovereignty within the terrritories is brought into question by these arguments. The principle recognizes universally the capacity of a community of people, through inherent sovereignty, to govern themselves. At one time, as we shall see below, it became the watch-word of those who sought thereby to evade altogether Congressional influence over State formation.

It is readily seen that the arguments in support of the claims above stated, relate to the interpretation of the clause in the Constitution granting Congress authority to admit States. An answer as to which theory is correct would

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[1] Congressional Globe, second session XXXIX Congress. See remarks by Senator Edmunds, of Vermont, relative to admission of Nebraska—pp. 332, 338 and 339.

involve a construction of this clause. But the Supreme Court has never determined the nature or extent of the authority hereby granted. The solution of the open question must, therefore, be sought in an examination of the precedents that have been established in actual practice.

The method to be pursued in our search will consist in an historical review of the procedure in the course of admission and an analysis of the provisions of the admitting acts.

II.—Historical Basis of the Claim to Admission and the Claim to Congressional Control.

But first, let us consider some of the historical and constitutional grounds for the support of the conflicting claims. The authority in pursuance of which States have been admitted, is found in the third section of the fourth article of the Constitution. With the exception stated in this section, referring to particular cases, there is no declaration as to when, or how, the admission shall take place. Nothing is said about the right of any people to claim admission as a State, or the obligation on the part of Congress to grant such admission. We must look outside the Constitution for any authority upon which to found the doctrine of the right of the community to become a member of the Union.

(*a*)—*The Cession of Virginia.*

The origin of this doctrine is found in a series of transactions, which culminated in an ordinance passed by the Continental Congress in 1784, for the government of ceded territory embraced between the Alleghanies and the Miss-

issippi. Virginia ceded this region to the Confederation but a short time before the passage of the ordinance, and by so doing, put an end to the long-continued dispute between herself and Maryland regarding it, which so nearly prevented the adoption of the Articles of Confederation. This region, known as the territory northwest of the river Ohio, was ceded upon the condition that it should be laid out into States, which should be admitted into the Union. Congress had previously urged that such cession be made, on the ground that territory acquired by the common sacrifice of all the colonies should be held for the common benefit, and promised, as an inducement, that the ceded territory should be formed into States.[1] And so we find in the first transaction by which the old Confederation acquired dominion over an extensive territory, an express stipulation that States should be formed out of it.

(*b*)—*The Ordinance of 1787.*

Soon after the cession, Congress passed an ordinance for its government, which was succeeded by the more famous ordinance of 1787. These ordinances are important to the treatment of our subject, as they contain, besides the stipulation for the admission of States, the forms and provisions that appear in most of the admitting acts.[2]

The ordinance of 1784 begins with a description of the method by which the territory should be governed, and ends with a series of clauses which were to stand as a compact between the United States and each of the new States, unalterable, except by common consent. The clauses provided that the States should forever remain a part of the Confed-

[1] Story's Commentaries, Sec. 1361.

[2] Poore's Federal and State Constitution, p. 429.

eration; that they should in no case interfere with the disposal of the soil by Congress; that they should impose no tax on lands owned by the United States; that their government should be republican in form and that the lands of non-residents should not be taxed higher than those of residents before the State's delegates should be admitted to vote in Congress.[1]

The same descriptions and provisions were included in the ordinance of 1787, with the additional clauses that no person should be molested on account of his mode of worship or religious sentiments; that inhabitants should be entitled to their civil rights; that schools should be encouraged; that navigable waters should be free public highways; also the provision that whenever any of the said States should have 60,000 inhabitants, such State should be at liberty to form a permanent constitution and State government, provided it be republican and be admitted by its delegates into Congress, on an equal footing with the original States, in all respects whatever.

(*c*)—*Treaties with Spain, France, Mexico and Russia.*

Besides these ordinances for the government of the Northwest territory and the other similar ordinances for the government of smaller cessions made by other States, the treaty made with France in 1803,[2] by which Louisiana was acquired, contains an express provision that States should be formed from the ceded territory, which as soon as possible, should be admitted into the Union. The treaty made with

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[1] Curtis' History of the Constitution, Vol. I, p. 297.

[2] Poore's Constitution, p. 687, Sec. 3 of treaty.

Spain in 1819,[1] that with Mexico in 1848,[2] and that with Russia in 1867,[3] by each of which still further great annexations were made, contain like declarations. So that we see that the alleged duty on the part of the United States to admit States and the right of the people of the territories to be admitted, find support in the stipulation of the transactions by which the territories were acquired.

The Articles of Confederation contained no clause authorizing Congress to govern territories or admit States into the Union, and these omissions were considered serious defects. It has been asserted in the Federalist[4] (No. 42) by so high an authority as Madison, that the Congress of the Confederation acted wholly beyond its powers when it passed these ordinances.[5] On the other hand, the circumstances surrounding the adoption of the Articles, as well as the expectation which then prevailed that Virginia would cede the Northwest territory, has been considered sufficiently strong ground for upholding the validity of the acts. But all question as to this matter was laid to rest by their re-enactment by Congress, on August 7th, 1789.

(d)—Admission Clause of the Constitution.

During the debates in the convention that framed the Constitution, the representatives from the Atlantic States manifested much fear in contemplating the overwhelming weight the Southern and Western States would have when new States should be admitted and all become thickly settled.

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[1] Poore's Constitution, p. 308, Art. VI of treaty.

[2] Treaty of Gualalupe Hidalgo, Art. IX. States shall be admitted "at the proper time to be judged of by the Congress of the United States."

[3] Haswell's Treaties and Conventions, Art. III of treaty.

[4] Federalist, No. 38, No. 42, No. 43.

[5] Story's Commentaries, Sec. 1317.

This jealousy was particularly revealed over the question of adjusting the representation, when strong but ineffectual efforts were made to discriminate in favor of the Eastern States by making property, and not population, the basis of representation.[1] When the clause in regard to the admission of States came up for consideration, the committee of detail reported, in substance, that the new States might be admitted by two-thirds' vote of each House of Congress, as well as the concurrence of the State within whose limits the new States should be formed. Those formed within the limits of old States, were to have the same status as the original, but nothing was said about the character of those to be formed outside the limits of the old ones. It was agreed, upon motion, to amend the reported section, so as to give the legislature unlimited discretion as to the terms upon which it may admit States. The clause was thereupon adopted in its present form.[2]

There is nothing, therefore, so far as the Constitution is concerned, which limits or constrains Congress in any way in the manner of exercising the power; while the claim in behalf of the territories finds support in the declaration contained in the laws of Congress and in the stipulation, made in treaties and cessions.

Let us now review the procedure in the course of admission.

III.—Historical Review of the Process of Admission.

The first State to enter the Union was Vermont. She was in the contemplation of the framers of the Constitution,

[1] Bancroft's History of the Constitution, Vol. 2, p. 84, etc.

[2] Elliott's Debates, Vol. V, p. 493.

having existed in virtual independence of New York for many years, and having formed a constitution for herself in 1777. Her application was made in 1791, and the act of Congress simply stated that Vermont should be received and admitted into the Union as a State.

Like Vermont, Kentucky was also in the minds of the framers. Her application was made in 1791, and the act for her reception and admission passed in 1792. The acts of Congress in both of these cases seem to be merely recognitions of these two States, as members of the Union.

Tennessee comprised the territory acquired by cession from North Carolina, known as the territory south of the River Ohio, and was governed for a long time by a territorial ordinance similar to that for the government of the Northwest territory. Her people adopted a constitution for themselves and applied for admission in 1796. The admitting act, passed in the same year, was the first to contain the phrase—"on an equal footing with the original States in all respects whatever"—a phrase which is, in effect, contained in the admitting acts of every State subsequently admitted.

Ohio, admitted in 1802, upon petition made the same year, was the first to be formed within the territory ceded by Virginia. She was also the first to pass from the territorial form under the direction of an enabling act, which from that time has been the usual precedent of the admitting act. She was likewise the first to enter the Union under conditions—her Constitution must be republican and not repugnant to the ordinance of 1787.[1]

The following propositions were offered by Congress to

[1] Poore's Constitutions, p. 1453.

Ohio for free acceptance or rejection: *First*, that certain sections of land be granted to the inhabitants of townships for school purposes; *Second*, that the Scioto Salt Springs be granted to the State for the use of the people, provided the legislature never lease the same for over ten years; and *Third*, that one-twentieth part of the net proceeds of lands be applied to laying out and making public roads. The foregoing propositions were made upon condition that the State convention provide by an ordinance irrevocable, without the consent of the United States, that every tract of land sold by Congress be exempt from any State tax until five years after date of the sale. Ohio accepted the propositions made by Congress, and in fulfilling the requirements annexed thereto, submitted to a third condition of admission.

Louisiana, known for a long time as the territory of Orleans, was the first State to be formed within the vast territory ceded to the United States by France in 1803. After much preliminary legislation, and in response to a memorial of the legislature of the territory, an enabling act was passed by Congress in 1811. It specifies, in the first place, a number of conditions based upon the ordinance of 1787 and requires, further, the passage of an irrevocable ordinance, embracing other stipulations which can be found in the same act, and contains, also, a clause relating to the five-year exemption from taxation of public lands sold by the United States, mentioned in Ohio's enabling act. This act is peculiar, in that it makes no offer as an equivalent for the passage of the ordinance by the people of the territory. The ordinance which Louisiana passed omitted to say that the Mississippi river was a free public highway. So, later in the admitting act, Congress made such a declaration a con-

dition of admission, and stipulated that "the above condition and also all the other terms and conditions contained in the third section [of the enabling act] shall be considered, deemed and taken, fundamental conditions and terms upon which the said State is incorporated into the Union."[1] The act for the admission of Louisiana was passed April 8th, 1812.

Few new features appear in the course of the admission of Indiana in 1816, Mississippi in 1817, Illinois in 1818, Alabama in 1819, or Maine in 1820. Maine entered without an enabling act, having separated from Massachusetts with the consent of the latter. All excepting Mississippi, whose petition for admission was made as early as 1811, were admitted soon after their applications were presented to Congress, and with the same exception, all obtained equivalents for passing the irrevocable ordinances.

The prolonged and bitter debate incident to Missouri's admission, suggests the long struggle to come over the question of slavery. Missouri's application for incorporation into the Union was made in 1819, and the admission took place in 1821. The enabling act, passed in 1820, expresses in the eighth section the celebrated Missouri Compromise in the sentence "there shall be no slavery in all the territory ceded by France north of the parallel of 36° 30′ North latitude, but escaped slaves shall be returned to their masters." It was further stipulated between Missouri and the United States by the terms of the admitting act that "the fourth clause of the twenty-sixth section of the third article of the Constitution submitted on the part of said State to Congress, shall never be construed to authorize the passage of any law,

[1] Poore's Constitutions, p. 710, Sec. 1.

and no law shall be passed in conformity thereto, by which any citizen of either of the States of this Union shall be excluded from the enjoyment of any of the privileges and immunities to which such citizen is entitled under the Constitution of the United States."[1]

Although by this time the enabling act was considered a requisite step in the proper admission of a State,[2] Arkansas, nevertheless, refused to wait for such a formality, but adopted a constitution framed by a popular convention, claiming the right of admission by virtue of the treaty of cession by France, and presented it to Congress with an application for admission. Soon afterward, an act was passed by Congress which, however, rejected the propositions offered by Arkansas, and prescribed, on its part, that the State should not interfere with the primary disposal of the soil by the United States, nor levy any tax upon the lands of the United States. A supplementary act was passed seven days later which rejected, as before, the propositions made by the convention of Arkansas, and offered for free acceptance virtually the same propositions made to other States previously admitted, upon the condition that the State pass the usual irrevocable ordinance.

Michigan was associated with Arkansas in the process of admission. The history of her admission is as interesting as it is different from that of any of the States we have yet considered. While it furnishes an illustration of the vigor and tenacity with which the parties held to their respective claims, it fails as an instance of a triumph or defeat for

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[1] Three, Statutes at Large, p. 645.

[2] Opinion of Attorneys-General, Vol, II, p. 727.

either. Michigan claimed not only the right to be admitted by virtue of the ordinance for the government of the Northwest territory, but the right to be admitted with the boundaries previously assigned to her.[1] Her conflict with Congress, which was long-continued and bitter, arose not so much from a disinclination on the part of Congress to grant her petition for admission or recognize any claim she might make in that behalf, but from an unwillingness and inability to accede to her demands with respect to boundaries. When Ohio was admitted in 1802, a portion of territory was included within her limits which Michigan now claimed as rightfully belonging to her. In the long delay consequent upon the refusal of Congress to act upon her application, Michigan, of her own accord, framed a State Constitution and government under which she acted in the capacity of a State, in disregard of Congressional authority over her until she was admitted in 1837. By an act of Congress, a special convention in Michigan was required to ratify the boundaries for the State prescribed by the act. Such ratification was long refused, during which time the anomalous condition existed of a people claiming and performing the functions and prerogatives of a State, and yet not recognized by Congress as a member of the Union. A strip of land to the northwest being added to the territory, a convention of interested citizens formally approved the disposition made by Congress. This was accepted by the National Legislature as a ratification of its demands, and a bill for the admission of Michigan was duly passed. And so, by this means, the threatened conflict between the two parties was averted. But it must be said in favor of Michigan, that the acts of its

[1] American Commonwealth series; Michigan, p. 222.

various State departments, during the period of assumption of State power, were afterwards approved and ratified by the State, but never repealed; while, on the side of Congress, it must be granted that the only requirement insisted on was submitted to.

Florida and Iowa were associated for a time in their admission. Each formed State Constitutions without enabling acts. Florida claimed the right to admission by virtue of the treaty made with Spain,[1] but her admission did not take place till six years after the adoption of her Constitution. It was stipulated in an act of Congress relating to both States, that township electors should certify to so much of the act as related to Iowa, and that the two States should not tax lands of the United States. Supplementary acts made propositions and required irrevocable ordinances, the contents of which are already familiar. Florida was admitted in 1845, and Iowa in 1846. Texas, unlike other members of the Union was, before her admission, an independent republic. The consent of Congress to her admission was given March 1, 1845, upon condition that her boundaries should be settled by the United States government; that she should cede to the United States her public edifices, etc., but should retain duties, debts, etc., with all the vacant and unappropriated land for their payment, and that States might be formed out of the republic. On December 29, 1845, a joint resolution for the admission of Texas was passed.

Nothing new was developed in the admission of Wisconsin in 1848, of California in 1850, Minnesota in 1857 or Oregon in 1859.

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[1] Poore's Constitutions, treaty with Spain. Art. VI, on p. 309; also the preamble to the Constitution of Florida, p. 317.

Oregon and California entered without enabling acts. California, acquired from Mexico in 1848, never existed under the usual form of government common to the territories. Wisconsin's petition was made as early as 1845, and the others made application at comparatively short periods before admission.

The name of Kansas suggests the beginning of the end of the long struggle for the perpetuation and advancement of slavery. It was early discerned by the Southern statesmen that the perpetuation of the institution of slavery was dependent upon its development in the territories, and its establishment in new States, and so the virgin fields of Louisiana and the territories acquired from Mexico were looked upon and seized greedily as a means of its extension. The Missouri Compromise of 1820[1] intended as a permanent check to the growth of slavery, merely temporized with the institution and furnished a resting spell for thirty years.

By the compromise measures of 1850, the wedge was entered for opening up all the territories of the Union to the unlimited extension of slavery. By these measures, it was provided that California should enter the Union as a free or slave state, as the inhabitants thereof might determine, and Utah and New Mexico, organized as territories by the act, were forbidden to interfere with slavery within their limits, either to prohibit it, if it did exist, or to establish it, if it did not exist.

The Kansas-Nebraska bill of 1854, declared that Congress could not interfere with slavery in the territories, because it was a principle of the United States Constitution that the

[1] Statutes at large, Vol. 3, p. 545.

people thereof could determine their domestic concerns as they saw fit.[1]

The principle here declared and the establishment of which was hereby sought to be secured, is a phase of the doctrine of popular sovereignty. It was termed, in ridicule, "squatter sovereignty."

Although enunciated with special reference to slavery, within the scope of this theory may fairly be included the asserted territorial right to establish any domestic institution not prohibited by the Constitution, and to adopt any method of government, provided only it be republican, and furthermore, to be admitted by Congress into the Union as a State, with the institutions and the framework of government thus determined.

The field was thus left open for the operation of this theory in these territories, and the opportunity afforded for a complete and successful test of its validity and that of the territorial claims.

The history of the Kansas struggle affords new phenomena in the line of State formation and admission. It may be summarized as follows: The first territorial election, conducted by fraud and violence, and with the aid of a large Missouri contingent, resulted in the choice of a territorial legislature that was almost wholly in favor of slavery. This legislature was recognized by the authorities at Washington as the legally constituted legislative body of the terrritory. The free State party refusing to recognize the legislature then fraudulently constituted as the lawful authority, proceeded to organize a government for their own protection, adopting a State Constitution and applying to Congress for

[1] Statutes at Large, Vol. 10, p. 277, *et passim*.

admission into the Union as a free State. This they claimed as a right by virtue of the principle of popular sovereignty —a right in nowise diminished on account of the mere fact of the existence of a territorial legislature, organized and conducted wholly in the interests of slavery. A petition for admission was also presented to Congress from the recognized territorial legislature, asking for admission as a slave State. But the organization of a State government by the free State party under the circumstances was declared by the President in a proclamation[1] to be an illegal act, and attempts at its maintenance were threatened with suppression by Federal power as acts of insurrection against both Congressional and territorial authority. In fact, on two occasions, Federal troops were actually employed in the dispersion of conventions of the free State party, and the arrest of the members.[2]

The increase in the free State party in the territory, through immigration from Eastern States, soon brought it into control in the territorial legislature, and so all further attempts at independent State government ceased.

These events quite sufficed to make apparent, if not the fallacy of the theory of popular sovereignty as a principle of the Federal Constitution, at least its insufficiency and weakness as a means of peacefully settling questions of territorial policy.

No bill for the admission of Kansas, in response to either of the applications, succeeded in passing both houses, and it was only after the collapse of the dogma of popular sovereignty and the withdrawal of Southern Senators and Repre-

[1] President Pierce, Feb. 11, 1856.

[2] At Topeka on July 4, 1856, and Jan. 6, 1857.

sentatives from Congress, that a law for the admission of Kansas was passed.

And so the only occasion in our history when the territorial right to admission may be said to have been put to the test by actual experiment, made in pursuance and under the sanction of Congressional enactment, resulted in disaster to the territorial claim.

The act for the admission of West Virginia, in 1863, her separation from Virginia having been accomplished during the war, specified certain changes to be made in her Constitution relative to the freedom of slaves.

Nevada's incorporation into the Union was accomplished in 1864, under conditions which were significant of the times. In compliance with the terms of the enabling act, the members of her convention first declared that they adopted the Constitution of the United States, and then framed a constitution republican in form and not repugnant to the Constitution of the United States nor the principles of the Declaration of Independence. By the irrevocable ordinance, Nevada agreed that there should be no slavery or involuntary servitude within her limits and that there should be perfect religious toleration.

Nebraska was incorporated into the Union in 1867, under the new condition that within her jurisdiction there should be "no denial of the elective franchise or of any other right to any person because of race or color, excepting Indians not taxed, and upon the further fundamental condition that the legislature by solemn public act" * * * "declare the assent of said State to said fundamental condition."

Nothing new was developed in the process of Colorado's admission, which was accomplished in 1876.

North Dakota, South Dakota, Montana and Washington were admitted into the Union on the same day, in 1890, by proclamation of the President. The admitting act is an elaborate document of twenty-five sections, and enters at length into the details of the formation of the States. These States entered the Union under restrictions as to the taxation of lands of the United States and those of Indian tribes.

An entirely new feature is the stipulation that a system of public schools should be established and maintained in the States, which should be free from sectarian control. As if to guard against the recurrence of an event like that displayed in the history of Michigan's admission, it was provided in the ninth section of the enabling act that the territorial officers should discharge their duties until the State officers should be elected and the States be admitted.

Wyoming and Idaho, admitted in 1891, exhibit no new features in the process of their admission. At the present time, bills for the admission of Arizona, Oklahoma, Utah and New Mexico are before Congress.

Between the outbreak of the Rebellion and the close of the period of reconstruction, eleven of the old States were restored to their former rights, which had been forfeited by attempted secession. Tennessee, the first to re-enter the Union, escaped the operation of the process of reconstruction. By that process, the States were virtually reduced to provinces, divided into military districts, and subjected to military authority until the people thereof had formed loyal governments.

The whole procedure is justified as the exercise of the war powers of the general government. Among conditions precedent to admission, were the adoption, by each State, of a

constitution framed by impartial suffrage, granting the franchise to the blacks, and the ratification of the fourteenth amendment.

Texas, Virginia and Mississippi, restored at a later period than the others, ratified the fifteenth amendment, as well as the fourteenth. It was not until January, 1871, that all the States were represented in both houses of Congress, for the first time since 1860.[1]

All these States agreed to the additional condition of restoration, that their constitutions should never be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote, who were entitled to vote by the Constitution, which had been adopted by them. Two further fundamental conditions of restoration were agreed to by Texas, Mississippi and Virginia—*First*, they were never to deprive any citizen of the United States of the right to hold office, on account of race, color or previous condition of servitude, and *Second*, their constitutions were never to be so amended or changed as to deprive any citizen of the United States of the school rights and privileges secured therein.

It is evident from this review of the facts developed in the process of admission, that no uniform practice has prevailed either as to the time at which a State should be admitted or as to the manner in which such admission should take place. Some have been admitted soon after the applications were presented; others have been compelled to wait for a long time. Some, again, adopted for themselves State constitutions and governments, and were admitted forthwith; others entered under the direction of enabling acts. It is

[1] Encyclopedia of Political Science: Reconstruction, p. 554.

difficult to draw a conclusion as to the territorial right to admission from this practice. A well-defined right demands precision as to the time and manner of its assertion. It is natural that the territories should desire to enter the Union immediately after their applications for admission were presented, and upon terms of perfect equality with the original States. So far then, as the times of admission were delayed after the applications to Congress were made, by so much is the claim in behalf of the territories weakened, and the same is true when any particular method of procedure has been prescribed by Congress and submitted to by the territory. But these delays and prescribed methods do not completely destroy or negative the existence of such a right in the territories. The continued assertion of the right, and the mere fact of admission, are themselves strong evidences of its existence.

Nevertheless, if the facts developed in the Kansas struggle should be taken to determine the fate of the question, the right of the territories to be admitted into the Union as States, cannot longer be relied upon or rightfully asserted as an active principle of territorial action.

On the other hand, it would seem that Congress has assumed to itself a large degree of discretion over the matter, not only in determining the times of admission and the methods of procedure, but also in prescribing terms upon which the admission shall take place.

In general, the acts of admission are similar, both in respect to form and content, but some acts contain provisions not mentioned in others. By submitting to the stipulation of the admitting acts, the territories profess to bind themselves when States to the observance of the particular re-

quirements expressed in the acts. Can it be that in this way they subject themselves to restrictions other than the ordinary and recognized constitutional limitations upon State action.

IV.—Analysis of the Provisions of Admitting Acts.

If it should be shown that restricted capacity of action was, in truth, the result of the terms entered into at the time of admission, the claim made in behalf of the territories to the right of incorporation into the Union as States, would be completely overthrown; for, in that event, it would be made equally certain that the very essence and character of the new States are determined at the time of admission, not by the choice or preference of the territories, but by the will of Congress. Congress, under our system of government, is established as the law-making department, but it may pass only such laws for the enactment of which authority is given by the Constitution.

As the tenth amendment secures to the States (or to the people) all the powers of government which are not delegated by the Constitution to the United States, nor prohibited by it to the States, it follows that an examination of the stipulation of admission, in the light of that instrument as authoritatively construed, will reveal those which may be without constitutional sanction. These of course will be the provisions which will operate as extra-constitutional limitations upon the States.

The terms upon which States have entered the Union, may be classed under six heads, according as they relate—*First*, to the public lands and other property of the United

States; *Second*, to navigable waters; *Third*, to the interstate rights of United States citizens; *Fourth*, to public schools; *Fifth*, to the right of suffrage, and *Sixth*, to the principles of civil and religious liberty.[1] Under a *seventh* heading may be classed those conditions under which reconstructed States were restored.

First—Of the various stipulations of the first class, the most numerous are those which purport to bind the States not to tax lands of the United States.

(*a.*) The Constitution gives Congress power to make needful rules and regulations respecting the territory and other property of the United States.[2] This grant of power to Congress suffices of itself to debar the States from making similar rules respecting the public lands. As to the extent of the taxing power of the States, the early case of McCullough vs. Maryland,[3] adjudged that the State's tax upon the Bank of the United States was invalid, as such institution was a means for carrying on the powers of the general government. All such means were there declared to be above the State's demand for tribute. In a late case[4] the Supreme Court held that Tennessee could not tax lands so long as the title remained in the United States. This rule being applicable to all the States, it is idle to look further for a restriction in this particular.

(*b.*) The same conclusion is reached in cases where the lands of Indian tribes are removed from State taxation. The

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[1] Political Science Quarterly, Vol. III, No. 3, p. 425.
[2] Constitution, Art. IV, Sec. 3, Clause 2.
[3] 8 Wheaton, p. 316.
[4] Van Brocklyn vs. Tennessee, 17 U. S., p. 151.

claim of the United States to these lands extends to the complete ultimate title, which is charged, however, with the right of the Indians to occupation.[1] The States have no control over the Indians so long as they maintain their tribal relations.[2]

(*c.*) In many cases States forego the right to tax land for from three to five years after sale by the United States. The constitutional power in Congress to make rules and regulations respecting the territories, is a restriction on State action in that field of legislation. The above provisions may be justified as an exercise by Congress of this constitutional power.[3] The stipulations, however, generally appear in the form of compacts, by which lands are granted to the State in exchange for the promise of exemption. Amounting as they do to the same thing as ordinary contracts, their violation or repudiation would, in all probability, bring the guilty State into conflict with the constitutional provision against impairing the obligation of contracts.[4]

(*d.*) The agreement that Michigan should give up a portion of her southern boundary is really nothing more than a disposition of the territory of the United States by Congress. It has been viewed, however, as a construction of the ordinance of 1787, rather than a simple matter of territorial legislation.[5]

Second—It has been made a stipulation of admission on several occasions that navigable rivers should be free public highways.

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[1] Beecher vs. Wetherby, 95 U. S., p. 517.

[2] United States vs. Kagama, 118 U. S., p. 375.

[3] Constitution, Art. IV, Sec. 3, Clause 2; see also dicta in Pollard's Lessee vs. Hagan, 3 Howard, p. 224, etc.

[4] Constitution, Art. I, Sec. 10, Clause 1. See also Green vs. Biddle, 8 Wheaton, p. 87.

[5] Cooley's Constitutional Limitations (4th Edition), p. 34.

The earliest case on the subject of navigable rivers relates to the construction of the article of compact by which Alabama agreed that navigable waters within her boundaries should be free public highways.[1] It was there declared that the supposed contract was nothing more than a regulation of commerce to that extent among the several States.

The power to regulate commerce is given to Congress by the Constitution,[2] and it has been declared in a decision of the Supreme Court rendered in 1865, that this power comprehends the control for the purpose and to the extent necessary of all the navigable waters of the United States, which are accessible from another State than those in which they lie.[3] It follows necessarily that no restrictions have been inflicted upon States by reason of the particular mention of this subject on the occasion of their admission.

Third—The terms of the third class are those which relate to the interstate rights of United States citizens.

(*a.*) Many of the new States have agreed that the lands of non-residents who are citizens of the United States shall not be taxed higher than those of residents of the State.

The United States Constitution declares that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States,[4] and it has been held by the Supreme Court[5] that the equal taxation of residents and non-residents is secured by this clause of the Constitution so far as the citizens of the several States are concerned.

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[1] Pollard's Lessee vs. Hagan, 3 Howard, 212; also Withers vs. Buckley et al., 20 How., 93.
[2] Constitution, Art. I, Sec. 8, Clause 3.
[3] Gilman vs. Philadelphia, 3 Wallace, 724.
[4] Constitution, Art. IV, Sec. 2.
[5] In Ward vs. Maryland, 12 Wallace, p. 418.

But the citizens of the United States who are residents in the territories or in the District of Columbia are not thus protected from discrimination by this particular clause of the Constitution.

The fourteenth amendment to the Constitution provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

The matter has not been judicially determined, but judging from the interpretation that has been given to the amendment, it is not likely that the equal taxation of all the citizens of the Union, whether resident in States or not, will be considered as placed by it within the guarantee and protection of the Federal government.[1] Territories that have entered the Union under conditions of this sort, may, therefore, be said to rest, as States, under the suspicion of limitation in respect to their taxing power in this comparatively unimportant particular.

(*b.*) The single condition of Missouri's admission, that no law should be passed by the State by which any citizen of any other State should be excluded from the enjoyment of the privileges or immunities to which such citizen is entitled under the Constitution of the United States, is readily seen to produce no restriction on that commonwealth that is not imposed by the Constitution upon all.[2]

Fourth—Several States lately admitted agreed by irrevocable ordinances to establish and maintain systems of public schools, which should be open to all the children of said

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[1] See, for example, Slaughter House cases, 16 Wallace, 36, *et passim*, and Civil Rights cases.
[2] Constitution, Art. 4, Sec. 2.

States and be free from sectarian control. In most cases of admission, generous provisions have been made for education by grants of land for schools and universities. But Congress has no express power to make laws respecting education. Such matters being left to the freedom of State control, the above stipulations cannot operate otherwise than as restrictions.

Fifth—At the time of Nebraska's admission, many[1] Northern States retained the word "white" in the suffrage clauses of their Constitutions, but that State entered the Union under the prohibition to deny the right to vote to any citizen on account of color. The right to regulate the qualification of voters was at that time an undisputed prerogative of the States. This condition was, therefore, plainly a limitation upon Nebraska. But the subsequent adoption of the fifteenth amendment has made such limitation effective upon all the States.

Sixth—The formation of a constitution not repugnant to the ordinance of 1787 was among conditions precedent to the admission of the States formed from the Northwest territory, as it was also of several others. This ordinance contains a number of provisions particularly intended to secure within the States, the fundamental principles of civil and religious liberty. Are the States deprived of any of the original and recognized powers of action by reason of the adoption of this ordinance?

(*a.*) Take, in the first place, the subject of slavery. The existence of that institution was prohibited by the terms of the ordinance.

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[1] Thirteen.

Before the adoption of the thirteenth amendment to the Constitution, no mention was made in that instrument regarding the abolition of slavery. Its existence within a State was purely a matter of State policy. And so it follows that since these various communities entered the Union, upon the terms above stated, their ability to establish slavery within their limits lay justly open to question.

Restrictions in this respect are to-day common to all the States, for by the adoption of the thirteenth amendment, "no slavery" has become a part of our fundamental law.

(*b.*) The same ordinance, further, secures to the individual the benefit of the writ of *habeas corpus*, of trial by jury, of judicial proceedings according to the course of the common law, of exemption from excessive fines and from cruel and unusual punishments; of due process of law in the deprivation of life, liberty and property, and compensation for property or services taken by the State without consent. Any law impairing the obligation of contracts was also declared void.

Provisions similar to these were and are contained in most of the State Constitutions. The Federal Constitution forbids the State to pass laws impairing the obligation of contracts.[1] But no other positive protection to the civil rights is guaranteed except by the fourteenth amendment by the following clauses: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor to

[1] Constitution, Art. 1, Sec. 10.

deny any person within its jurisdiction the equal protection of the laws."

Can it be said that protection to the civil rights in the forms enumerated in the ordinance, finds a national guarantee in these clauses of the amendment?

The Supreme Court has held that the privileges and immunities of citizens of the United States do not include all the principles of civil liberty and that the fundamental civil rights are, as before the passage of the amendment, under the primary care of the States.[1]

Each State is, however, limited in its power by the prohibition to "deprive any person of life, liberty, or property without due process of law," or to "deny to any person within its jurisdiction the equal protection of the laws."

There has been no satisfactorily precise or comprehensive definition of the words, but it may in general be said that by "due process of law," is meant the usages and procedure of the common law.[2] The phrase is equivalent to the words "law of the land," found in Magna Charta, and as used in most of the State Constitutions and in the fifth amendment to the United States Constitution, as well as the fourteenth.

As the Supreme Court has construed the expression liberally,[3] we may say that compensation for expropriated property, trial by jury, exemption from excessive fines and from cruel and unusual punishments, are included within the scope of the "due process," which the fourteenth amendment prescribes shall be observed in every State.

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[1] Slaughter House case, 16 Wallace, p. 77.

[2] Murray and Kagen vs. Hoboken Land and Improvement Co., 18 Howard, 272.

[3] Davidson vs. New Orleans, 96 U. S., 97; McMillan vs. Anderson, 95 U. S., 37.; Railroad Tax Cases, 13 Federal Reporter, p. 763.

Judge Cooley[1] says that "due process" does not refer to rules of procedure merely, but to "those principles of civil liberty and constitutional protection, which have become established in our system of laws." The privilege of the writ of *habeas corpus* may fairly be included as part of the "due process of law," under such a definition. With this interpretation of the amendment, it is certain that no unfavorable discrimination exists to-day by reason of these provisions about the civil rights.

(*c.*) But the case is quite different with respect to religious liberty. Freedom from molestation on account of mode of worship or religious sentiments was guaranteed by the ordinance of 1787. It cannot be claimed that Congress possesses authority over the subject of religion. The very first amendment to the Constitution forbids the United States making any law "respecting the establishment of religion or prohibiting the free exercise thereof." No decision has been rendered on a case arising under this clause of the amendment, but by the construction given to the second clause, which is of a similar character, it is plain that the subject of freedom of worship and the religious character of the institutions rests, primarily at least, under the control and protection of the States.[2]

Seventh—Cases of the Reconstructed States.—The States which were subjected to the process of reconstruction, reentered the Union under the condition that no citizen or class of citizens of the United States should be deprived of the right to vote, except as a punishment for

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[1] Constitutional Limitations (5th edition), p. 435.
[2] United States vs. Cruikshank, 92 U. S., 542.

crime. Now, the right to regulate the qualification of voters rested originally with the States. The above condition was, therefore, for a time, a restriction upon such of the States as were restored before 1865, when, by the adoption of the fifteenth amendment, this particular limitation was placed upon all the States of the Union.

Mississippi, Virginia and Texas agreed not to deprive citizens of the United States of the right to hold office, on account of race, color, or previous condition of servitude.

It cannot be claimed that the right to hold office is a right of United States citizenship by any express grant in the Constitution, nor has the fourteenth amendment to the Constitution received such a liberal construction as to justify its classification with those privileges of United States citizenship, which the States are required to respect and give the protection of their laws.

As a matter of fact, the right to hold office was included as part of the fifteenth amendment when first proposed in Congress, but was not mentioned again after the amendment was referred to the committee of conference for preparation and final report.[1]

In the cases of these last-mentioned States, the guarantee of equal school privileges to citizens of the United States with citizens resident within the States, was required. This condition is recognized as similar in character to that in regard to the taxation of non-residents, which we have noticed before. Equal school privileges are secured by the Constitution to citizens of the several States, but citizens of the United States resident in the territories or the District of Columbia are not thus protected by the Constitution.

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[1] Congressional Globe, third session XL Congress, pp. 1040, 1428, 1481.

From this examination it is apparent that restrictions upon State action have been caused by the terms of admission. Many of the stipulations are, however, superfluous, being nothing more than statements of the laws as they stand. Others, that produced limitations at the times enacted, were afterwards made operative upon all the States by amendments to the Constitution. Those that still bind States in particulars over and above those which are recognized as constitutional limitations are few and comparatively unimportant.

The above conclusions are undoubtedly correct if the stipulations are binding on the States, or in other words, if they are effective as laws of Congress.

But whether or not the stipulations are valid and effective has not yet been judicially determined. It has been said by high authority that they are of no effect whatever, and likely such statement voices the popular opinion.[1]

No constitutional question under our system can ordinarily be considered as settled, until it has received the sanction of the Supreme Court.

But in the cases of issues, known as political, no settlement whatever is ever made by that tribunal.[2] We cannot say positively, but judging from the precedents and the nature of the question, there seems to be good reason to believe that this may be classed among those of a political character. If such be in fact true, the action of the legislature and the executive, which constitute the political

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[1] Congressional Globe, second session XXIX Congress. Remarks by J. G. Blaine, on p. 449; Mr. Sherman, on p. 360; Mr. Howard, on p. 339; Mr. Bingham, on p. 449, etc.

[2] Foster vs. Neilson, 2 Peters, 309; Garcia vs. Lee, 12 Peters, 515; Luther vs. Borden, 7 Howard, 42.

department of the government, must be deemed final and conclusive.

Upon this supposition then, so far as the facts developed in the foregoing review and examination justify a conclusion, it is one that is fatal to the territorial claim to admission into the Union.

What can be said in favor of a party whose claim is undetermined in its character and essence, or whose essence and character are fixed like the time and manner of its assertion by another party than the claimant?

Surely little remains to the territory but the bare right to admission at whatsoever time, in whatsoever manner, and on whatsoever terms, Congress may deem it fit to prescribe.

V.—The Stipulations of Treaties.

Whether any effect upon the claim to admission will be produced by the provisions of the treaties, remains yet to be considered.

The questions that arise are: *First*, do the provisions give a claim to individuals to the rights and privileges obtainable through statehood? And, *Second*, would the refusal by Congress to admit a State become a fit subject for international consideration?

The language of the treaties is in general to this effect: That States shall be formed from the ceded territories, which, as soon as possible, shall be admitted into the Union according to the principles of the Federal Constitution.

It amounts virtually to an agreement between the United States and the several foreign nations, and, consequently, falls within the cognizance of international law.

So far as the individual's claim upon the courts of this country is concerned, it may be confidently affirmed that the stipulations under consideration would receive very little attention. The cases hold that where private rights are stipulated for by treaty, and require no legislative act for their determination and enforcement, the courts may be appealed to for protection; but not so when the rights are undefined or require some legislation for their vesting or enforcement. In such cases the courts will refuse to proceed until the necessary steps have been taken by the legislative department. Still more decidedly would the rule be adhered to in a case like the present one, where no personal or private rights are involved, but the matter is purely of a public character. Such a case would, in all probability, be viewed as a political question and so escape adjudication, inasmuch as the Supreme Court has always consistently refused to take cognizance of them.

But should international complications ever arise, the first question to be decided would be the correct interpretation of the provisions.[1] By the terms of the treaties, the United States agrees to admit States into the Union, as soon as possible, according to the principles of the Federal Constitution. But what are the principles of the Federal Constitution with reference to the admission of States? We can judge of the principle in this case only by the practice, and we have seen from the foregoing examination, that the matter seems to be purely a question of national policy, resting solely on the will of Congress. That such an interpretation would naturally be given by foreign nations cannot be doubted. Its adoption would, therefore, be acceptable to all parties. The only

[1] Vattell's Law of Nations, p. 308, etc.

dispute that could possibly arise, would be as to the time or the terms of executing the agreement.

In behalf of the United States it could be made to appear that the national policy had always been decidedly in favor of the admission of new States.[1] In fact, the territorial governments inaugurated in the first instance by the United States were modeled after those of the States,. and imposed for no other purpose than to serve as a preparation for the fuller degree of self-government attainable through statehood.

The requisites for admission have generally been a sufficiently large population, permanently located, with enough intelligence and morality to admister successfully the affairs of a commonwealth founded on the principles of republican government, and although no particular degree of wealth, population,[2] intelligence or morality has been required, an insufficient abnormal or unhealthy development along any of these lines, would, undoubtedly, be considered for the time being, at least, a sufficient bar to the admission of any community.

Such an explanation of the policy of the United States would very likely be satisfactory to every nation with which we have treated, but should it prove insufficient, the peaceful methods of diplomacy would, in the last resort, be abandoned for those of force.

CONCLUSION.

A clearer conception of the character of the process of change from territory to State can, perhaps, be gained by

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[1] Pollard's Lessee vs. Hagan, 3 Howard, 393.

[2] 60,000 inhabitants have been stated and generally accepted as a sufficient number. Ordinance of 1787; Pollard's Lessee vs. Hagan, 3 How., 395.

taking into consideration the previous existence of the community as an organized territory. From whatever source it may be derived, the authority of Congress over the territories has always been asserted, and is now recognized as supreme. Although Federal control is displayed through the reserved rights of veto and appointment, the organized governments afford a large field for independent action, to the inhabitants of the territories. The essential and potential elements that go to make a State are there in operation. The organized territory is, in truth, an embryonic State.

Now, when it is proposed to change this condition of embryonic existence into that of full and complete statehood, it is apparent that no mere law of Congress will suffice to accomplish the result.

A State embraces a portion of territory from which the authority of the Federal government is so removed that its immediate action is very seldom felt. Its government depends for its existence and maintenance not upon laws of Congress merely, but upon the consent, and active, and continued support of the inhabitants and citizens almost wholly. No State constitution and government can therefore be foisted upon an unwilling people.

And so it is that satisfactory terms and convenient times and methods of admission, not only recommend themselves as the suggestions of a wise policy for general action on the part of the National Legislature, but in a way can be made conditions precedent to admission by the people of the territory by a refusal on their part to act on any other basis.

Co-operation and the adjustment of claims and differences on the part of both Congress and territory are consequently

essential to the termination of the embryonic condition of statehood and the completion of the State.

Independent of any particular standard, familiarity with the conditions upon which States have entered the Union, leads to the belief that the success of one territory over another, and the long-delayed admission in certain cases, are attributable not to the workings of a law, but to the dictates of policy, expediency or political necessity. Before the war, for instance, the slavery question was the disturbing element in national life, and its influence is clearly shown in the endeaver to counterbalance the admission of a Northern and free State by that of a Southern and slave State, and then maintain the balance of power between the two sections. Thus Louisiana succeeded Ohio; Mississippi, Indiana, and so forth. And the further fact that States are entitled to Senators and Representatives in Congress, and to Presidential electors equal to them both in number, and so wield considerable influence in national affairs, has always been a potent element in determining Congressional action in cases of admission.[1]

All these facts and considerations go to show that the question of the formation and admission of States is a political question, not to be determined, like ordinary questions of Constitutional law, by the judgment of judicial tribunals, but only through the action of the political departments of government.

To form conclusions in this matter is but to generalize from the precedents that have been established.

According to the decision of the majority of cases, the

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[1] In adopting a State government the question merely of the admission of the State is very rarely the chief question—the chief question is a question between parties, Cong. Globe, second session XXXIX Congress, p. 128. Sherman (Ohio).

Complete and formal method of procedure in the admission of States includes the passage of the enabling act by Congress after the territory's application for admission, as well as the passage of the admitting act when a satisfactory State Constitution has been adopted by the territory.

The formation of State Constitutions without the aid or direction of enabling acts may be said to result from the desire to advance the interests of particular territories, and hasten their admission by anticipating Congressional action; and other informalities and departures from correct methods, rectified and healed by the admitting acts of Congress, are to be viewed as the result of efforts of both parties to meet satisfactorily the requirements and exigencies of the particular cases.

By a similar method of decision we reach the conclusion that the right of the territories to demand admission into the Union as States is without foundation in constitutional law or actual practice. Although such admission is stipulated for in treaties, it is expressly or impliedly at the discretion of the National Legislature, and so remains purely a matter of national policy.

The notion may prevail in popular opinion that such a right exists, and the lax and informal methods of procedure as well as the large number of territories that have successfully entered the Union, may give the semblance of reality to the claim, but there is needed only its stubborn and persisted assertion by a territory in the face of the opposition of the National Legislature to make its invalidity apparent and its disappearance complete.

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